

Factual and Procedural Background

Campbell is a native and citizen of Jamaica who entered the United States as a lawful permanent resident in 1981. In 1983, he pled guilty in New York to attempted burglary in the second degree and was sentenced to an indeterminate term of imprisonment between one and three years. Govt.'s Exs. 2 and 6. Later that year, he pled guilty in New York to criminal mischief in the fourth degree, criminal trespass in the second degree, and petit larceny. See Govt.'s Ex. 3. In 1984, the former Immigration and Naturalization Service ("INS") issued an Order to Show Cause and Notice of Hearing, which charged that Campbell was deportable pursuant to § 241(a)(4)³, because he had been convicted of a crime of moral turpitude (attempted burglary) within five years of arrival in the United States. See Govt.'s Ex. 6.

In 1986, 1988, and 1999, Campbell was convicted in New York of criminal possession of a controlled substance in the seventh degree. Finally, in 2002, Campbell was convicted in Pennsylvania of possession of a controlled substance and possession of drug paraphernalia.

After the 2002 conviction, ICE reopened Campbell's long-dormant 1984 deportation proceedings. It alleged that, in addition to the grounds set forth in the 1984 Order to Show Cause, Campbell was also removable (1) pursuant to § 241(a)(2)-

3. Codified at 8 U.S.C. § 1227(a)(2)(A)(i).

(A)(iii) as an alien convicted of an aggravated felony (attempted burglary), (2) pursuant to § 241(a)(2)(B)(i) for his 2002 controlled substance offenses (the Pennsylvania drug and paraphernalia convictions), and (3) pursuant to § 241(a)(2)-(A)(ii) as an alien convicted of two or more crimes involving moral turpitude (the 1983 and 2002 convictions). See Govt.'s Ex. 4.

At his hearing before IJ Durling on November 19, 2003, Campbell applied for a concurrent waiver of inadmissibility under § 212(c) for all offenses before the enactment of the Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")⁴ and cancellation of removal under § 240A for his 2002 conviction.⁵ After examining Campbell's criminal history, work history, and

4. The IIRIRA eliminated § 212(c) relief and replaced it with § 240A relief.

5. Cancellation of removal under § 240A is not available to an alien who was convicted of an aggravated felony or has already received relief under § 212(c). See § 240A(a)(3) & (c)(6). By requesting concurrent relief, Campbell sought to eliminate his pre-IIRIRA convictions as grounds for deportation without rendering himself ineligible for cancellation of removal on the basis of the 2002 conviction.

personal circumstances⁶, IJ Durling granted concurrent relief and terminated the deportation proceedings.

ICE filed an appeal with the BIA, which reversed IJ Durling's decision and ordered Campbell's deportation. The BIA reasoned that Campbell was ineligible for cancellation of removal because, pursuant to the IIRIRA's transitional rules, he was in deportation proceedings governed by the law in effect before the enactment of § 240A. Matter of Campbell, No. A 37 460 559, mem. op. at 2 (E.O.I.R. Apr. 27, 2004), citing IIRIRA § 309(c).⁷ The BIA also noted that even if cancellation of removal were available, Campbell's burglary conviction would still render him ineligible under § 240A(a)(3), which denies cancellation of removal to an alien who has been convicted of an aggravated felony. Id.

Discussion

6. According to IJ Durling's extensive findings of fact, Campbell's criminal convictions stem from his "de minimis drug use off and on over the years", and he has not served jail time since the 1983 burglary conviction. In re Campbell, No. A 37 460 559, bench op. at 7 (E.O.I.R. Nov. 19, 2003) (granting relief and terminating deportation). IJ Durling also noted that if Campbell is deported to Jamaica, he is not likely to receive adequate medical care, which he greatly needs because he is HIV positive and suffers from both hepatitis and the effects of a spinal cord injury. Finally, IJ Durling found that Campbell works whenever possible, makes an effort to support his four children, and is the only person who can handle his mentally disabled eldest son. Id. at 5, 7.

7. The relevant provisions of § 309(c) are available in the Notes to 8 U.S.C.A. § 1101, at 83 (West 1999).

Campbell challenges the BIA's decision on five grounds. We examine each of his arguments in turn.

A. Availability of § 212(c)
waiver for post-IIRIRA convictions

Campbell first invokes the Supreme Court's decision in I.N.S. v. St. Cyr, 533 U.S. 289 (2001), for the proposition that IJ Durling's grant of § 212(c) relief waived all of his convictions, including the 2002 Pennsylvania offenses. This argument is without merit. The IIRIRA repealed § 212(c) as of April 1, 1997, but in St. Cyr the Supreme Court held that § 212(c) relief remains available for aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added). Pursuant to St. Cyr, then, Campbell remained eligible for relief for his pre-IIRIRA offenses. By the time of his 2002 drug and paraphernalia conviction, however, the IIRIRA had repealed § 212(c), and as to those offenses he is ineligible for the relief the statute had previously authorized. See St. Cyr, 533 U.S. at 297 (reviewing history of § 212(c)).

B. Expungement of 1983 burglary conviction
under § 212(c) as predicate for § 240A relief

Campbell next argues that the BIA erred in concluding that IJ Durling's § 212(c) waiver of the 1983 attempted burglary

conviction did not exempt him from § 240A's aggravated felony bar. This argument is also without merit.

As the BIA correctly noted, a § 212(c) waiver merely exempts an alien from deportation for a criminal offense and does not expunge it from his criminal record for immigration law purposes. Matter of Campbell, No. A 37 460 559, slip op. at 2, citing Matter of Balderas, 20 I. & N. Dec. 389, 391 (1991) (holding that "since a grant of section 212(c) relief 'waives' the finding of excludability or deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes"). Campbell thus would have derived no benefit from seriatim relief, which is why IJ Durling was so intent on providing him with concurrent relief under §§ 212(c) and 240A.

C. Availability of concurrent relief under §§ 212(c) and 240A

Campbell also argues that IJ Durling had the power to grant concurrent relief under §§ 212(c) for the pre-1997 convictions and § 240A relief for the 2002 offense. As IJ Durling noted in his decision, the BIA has never squarely addressed the availability of concurrent relief under these two provisions of the INA.⁸ See Matter of Campbell, No. A 37 460

8. Despite the fact that both IJ Durling and ICE raised the concurrent relief issue in Campbell's case, the BIA avoided it by holding that Campbell was statutorily ineligible for cancellation (continued...)

559, bench op. at 2 (E.O.I.R. Nov. 19, 2003). However, we need not resolve this issue because Campbell would not qualify for cancellation of removal under § 240A even if concurrent relief is procedurally possible.

As a result of the attempted burglary conviction, Campbell is not deemed under § 240A to have resided in the United States for the period of time necessary to qualify for cancellation of removal. An alien can only receive cancellation of removal if he was lawfully admitted for permanent residence for five years or more and has resided continuously in the United States for seven years after admission in any status. See § 240A(a)(1)-(2). Section 240A's "stop-time" rule, § 240A(d)(1), provides in turn that

[f]or purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien . . . has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title

As ICE argued before the BIA, Campbell's attempted burglary conviction stopped his § 240A clock only two years after his admission to the United States because it is both a crime of moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I), Matter of

8. (...continued)
of removal under § 240A relief because he was in deportation proceedings governed by pre-IIRIRA law. In other words, the BIA held that an alien in pre-IIRIRA deportation proceedings can be removed on the basis of a post-IIRIRA offense but, as to that offense, is ineligible for either § 212(c) or § 240A relief.

Frentescu, 18 I & N Dec. 244, 245 (1982), and an aggravated felony for which Campbell is removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).⁹

D. Retroactive application of the aggravated felony bar to § 240A relief

As we note above, cancellation of removal is not available to an alien convicted of an aggravated felony pursuant to § 240A(a)(3). Campbell claims that this provision is inapplicable here because attempted burglary is not an aggravated felony. In the alternative, Campbell invokes Landgraf v. USI Film Products, Inc., 511 U.S. 244 (1994), and argues that, even if attempted burglary is an aggravated felony within the meaning of the INA, § 240A(a)(3) should not apply retroactively to him.

9. IJ Durling apparently believed that, despite the 1983 conviction, Campbell could satisfy § 240A's continuous residence requirement because the § 212(c) waiver trumped the stop-time rule or somehow restarted his clock. However, we agree with the Government that there is no statutory basis for this approach to the problem. Section 240A(d)(1) provides that an alien's period of continuous residence or physical presence "shall be deemed to end" upon the commission of a qualifying offense. This language "indicates that Congress intended the accrual of qualifying time to terminate, or permanently stop, upon the first occurrence" of such an offense. Matter of Mendoza-Sandino, 22 I. & N. Dec. 1236 (2000) (emphasis added). Furthermore, the IIRIRA expressly provides that the stop-time rule applies retroactively when (as here) the former INS issued an Order to Show Cause before the IIRIRA took effect. IIRIRA § 309(c)(5); see also Rojas-Reyes v. I.N.S., 235 F.3d 115, 119-121, 122-24 (2d Cir. 2000) (reviewing legislative history of § 309(c)(5) and concluding that its retroactive application under these circumstances is constitutional). In view of these provisions, the most reasonable construction of the stop-time rule is that it bars § 240A relief even if (thanks to St. Cyr), the alien can receive a § 212(c) waiver for the offense.

There is no merit to Campbell's argument that attempted burglary is not an aggravated felony.¹⁰ As the Government notes, 8 U.S.C. § 1101(a)(43)(G) provides that a "burglary offense" is an aggravated felony, and this term surely encompasses attempted burglary.

The better issue is whether the aggravated felony bar is retroactively applicable here, assuming Campbell could overcome the effects of the stop-time rule. The retroactivity problem is important to Campbell and thousands of other aliens who committed crimes before the immigration law reforms of the past two decades attached serious consequences to their conduct that they could not have contemplated at the time. Under the law in effect when Campbell pled guilty in 1983, he would have been eligible for § 212(c) relief for the attempted burglary and subsequent offenses as long as he could accrue seven years' unrelinquished domicile in the United States before requesting a waiver.¹¹ Five years later, the Anti-Drug Abuse Act of 1988

10. The Government has questioned whether Campbell exhausted both this claim and his related assertion that his 2002 drug conviction is not grounds for removal. However, the record does not show what issues Campbell raised before IJ Durling, and if he did raise these claims at the hearing, the Government has not explained how Campbell could have preserved them for habeas purposes given that he prevailed before the IJ and appeared before the BIA as an appellee. In view of the fact that the Government has requested expedited consideration of Campbell's habeas petition, we have decided not to inquire further into the administrative record and have instead proceeded to the merits of these two claims.

11. It would not have been unreasonable for Campbell to hope that he could stave off deportation until he established the
(continued...)

introduced the concept of the "aggravated felony" to the INA. See Gerbier v. Holmes, 280 F.3d 297, 304 (3d Cir. 2002). The 1996 immigration law reforms then expanded the concept to encompass Campbell's offense, eliminated § 212(c) relief, and replaced it with § 240A and its aggravated felony bar. Thus, Campbell and other aliens who committed both a pre-IIRIRA aggravated felony as well as a post-IIRIRA removable offense are unable to obtain § 240A relief for the later crime.

Campbell first argues that the aggravated felony bar is not retroactive as a matter of statutory construction. In Landgraf, the Supreme Court held that, absent a clear command from Congress, there is a "presumption against statutory retroactivity," and "[w]ithout such a clear statement, retroactive application of a statute is impermissible when it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Ponnapula v. Ashcroft, -- F.3d --, slip op. at 8 (3d Cir. June 28, 2004) (internal quotations omitted), quoting Landgraf, 511 U.S. at 270, 280. We need not examine the burden that retroactivity imposes on Campbell because Congress has expressly stated that the aggravated felony bar applies retroactively. Section 1101(a)(43) provides that "the term ["aggravated felony"] applies regardless

11. (...continued)
seven years' domicile necessary for § 212(c) relief. Although the INS issued Campbell's Order to Show Cause in 1984, it did not seriously attempt to deport him until 2003.

of whether the conviction was entered before, on, or after September 30, 1996."

Campbell next argues that retroactive application of the aggravated felony bar violates his constitutional right to due process. See, Pet.'s Mem. at 7, citing United States v. Ubaldo-Figueroa, 347 F.3d 718 (9th Cir. 2003). The Supreme Court has held that the Due Process Clause of the Fifth Amendment prohibits Congress from enacting legislation whose "retroactive application is so harsh and oppressive as to transgress the constitutional limitation." United States v. Carlton, 512 U.S. 26, 30 (1994). A retroactive statute satisfies due process if it is a rational means of accomplishing a legitimate legislative purpose. Id. at 31.

Our Court of Appeals has not addressed whether the aggravated felony provisions of the IIRIRA violate due process, and in recent years the other circuits have diverged on the issue. In Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001), the Second Circuit held that these provisions not offend due process. The Court reasoned that Congress has a legitimate interest in protecting society from the commission of aggravated felonies, and it concluded that the aggravated felony bar rationally advances this interest because it results in the removal of aliens who commit these crimes. The Court also held that the expeditious removal of dangerous aliens is itself a legitimate governmental interest and that the uniform application of the

IIRIRA's aggravated felony provisions rationally furthers this end. Id. at 111-12.

In Ubaldo-Figueroa, however, the Ninth Circuit extrapolated a complex, multi-factor constitutional standard of review from the Supreme Court's retroactivity decisions and applied it to the IIRIRA's aggravated felony provisions.¹² The Court, in an opinion by Judge Pregerson,¹³ concluded that, in the case of aliens facing removal solely on the basis of a pre-IIRIRA offense that the statute deems to be an aggravated felony, retroactivity violates due process because its effects are not limited in time or scope and it "irrationally sweeps in and disrupts the expectations and lives of thousands of immigrants and their families because of their conduct far into the past."¹⁴ Ubaldo-Figueroa, 347 F.3d at 730.

We find that Kuhali most accurately states and then applies the appropriate standard of review. While the factors that the Ninth Circuit panel identified may be relevant in determining whether retroactive application of particular

12. The Court held that retroactivity analysis should include such matters as the temporal reach of the statute, the possibility that it reflects animus toward immigrants, the severity of the statute's consequences, and whether Congress enacted it to remedy a defect in previous legislation. Ubaldo-Figueroa, 347 F.3d at 727-28.

13. Judge Reinhardt and visiting Judge Archer joined the opinion.

14. The Court also found it "troublesome" that neither the legislative history nor the text of the IIRIRA explains why the expanded definition of aggravated felony applies retroactively.

legislation comports with due process, they do not add up to a multi-factor standard of review that has displaced the basic rationality standard that the Supreme Court rehearsed in Carlton. Moreover, without downplaying the significance of any of the troubling aspects of the IIRIRA's retroactive application that the Ninth Circuit panel identified, we agree with the Second Circuit that retroactive application rationally advances the governmental interest in crime control and the removal of dangerous aliens. The Ninth Circuit's concern that retroactive application sweeps too broadly and may result in the removal of individuals who committed offenses in the distant past is not particularly relevant in the case of Campbell and similarly situated aliens, who are repeat offenders in want of § 240A relief because they committed both an aggravated felony and a relatively recent, post-IIRIRA removable crime. Their removal self-evidently advances both of the aims that the Second Circuit has identified.

Most important of all, aliens facing removal as a result of a post-IIRIRA offense cannot complain that retroactivity contravenes "elementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf, 511 U.S. at 265. Campbell certainly could not have known in 1983 that Congress would later define attempted burglary as an aggravated felony. However, the 1996 amendments to the INA put him on notice that his prior conduct would preclude him from

seeking § 240A relief if he committed another removable offense. Campbell thus had ample opportunity to understand the consequences of future criminal conduct, and he has only himself to blame for the fact that he committed an offense in 2002 that led to his present predicament.

E. Applicability of the
Recreational Marijuana Exception

Finally, Campbell argues that his 2002 narcotics conviction is not a removable offense because it involved less than thirty grams of marijuana that he possessed for personal consumption. Section 241(a)(2)(B)(i) provides that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." Campbell's argument fails because, even if his 2002 conviction indeed involved possession of 30 grams or less of marijuana for personal use, it would still be grounds for removal. The statute provides an exemption for the one-time recreational marijuana offender, but Campbell's 2002 conviction was merely the last in a long string of drug convictions.

Conclusion

For the reasons provided above, we conclude that Campbell is not entitled to relief from deportation. We therefore deny both his motion for a stay and petition for a writ of habeas corpus.

BY THE COURT:

Stewart Dalzell, J.